

Susquehanna United Super Inc. d/b/a Richards United Super and United Food and Commercial Workers Union, Local 576, affiliated with United Food and Commercial Workers International Union, AFL-CIO, CLC. Case 17-CA-15661

August 11, 1992

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS
DEVANEY AND RAUDABAUGH

The issue presented in this case¹ is whether the Respondent violated Section 8(a)(1) of the Act by demanding that representatives of the Union cease picketing on traffic islands in the parking lot in front of its store and by causing the arrest of the representatives.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

The judge found that the Respondent did not violate Section 8(a)(1) of the Act by demanding that the Union's nonemployee pickets leave the traffic islands in the parking lot in front of the store and by causing the arrest of the pickets. Ostensibly applying the analysis set forth by the Supreme Court in its decision in *Lechmere, Inc. v. NLRB*, 111 S.Ct. 1305 (1992), the judge concluded that the Union lacked a derivative right under Section 7 since it neither represented, nor sought to organize or contact, the Respondent's employees. The judge therefore found that the Respondent's property right did not have to yield to the Union's picketing activities and accordingly dismissed the complaint.

We find, contrary to the judge, that the Respondent violated Section 8(a)(1) of the Act by prohibiting the peaceful picketing of the Union's representatives and by causing the arrest of those representatives. As explained below, we base this finding, however, on the Respondent's disparate treatment of union activity.

The facts are undisputed. The Respondent operates a retail grocery store located in a strip shopping mall. The grocery store is the anchor tenant in the mall. All of the stores share a common paved parking lot situated between the mall and a state highway. Three oblong traffic islands are located in the parking lot parallel to the sidewalk in front of the store.

¹ On March 10, 1992, Administrative Law Judge James S. Jenson issued the attached decision. The General Counsel and the Union each filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Respondent and the Union had a collective-bargaining relationship for many years covering separate units of clerks and meat department employees. The most recent agreement expired on January 10, 1989. In April 1989, during negotiations, the Union commenced a picket and handbilling campaign protesting the Respondent's bargaining proposals and encouraging the public not to shop in the Respondent's store. Initially, the Union handbilled and picketed at the store's front doors. Following several confrontations between the pickets and management, however, the Union moved the pickets to the two islands nearest the store entrance.

By letter dated April 5, 1989, the then-owner of the mall notified the Union that it objected to the picketing and that it had granted the Respondent the authority to have the pickets removed from the property. The Union moved its picketing activity to the gravel right-of-way next to the highway. By letter dated June 22, 1989, the property manager for the shopping center granted the Union the "right to picket and disperse information" to customers at the traffic islands in front of the store. The Union resumed its picketing and handbilling, but confined the activity to the traffic islands.

On April 6, 1990, pursuant to Board-conducted elections, the Union was decertified as the bargaining representative of employees in both units. Subsequently, the Union moved its picketing activity to the gravel right-of-way. In addition to carrying signs requesting customers not to shop at the Respondent's nonunion store, the union representatives staked picket signs into the right-of-way.

Sometime before July 26, 1990, ownership of the mall changed, and the new owners granted the Respondent's owners, Tom and Jane Richards, authority to request any person or persons to leave the premises of the mall if the Richardses determined at their discretion that the activity interfered with the Respondent's or any other tenant's business, to sign a complaint for trespassing or disturbing the peace, and to have unwanted or abandoned automobiles towed from the parking lot. This authority remains in effect.

By letter dated June 10, 1991, the Missouri Highway and Transportation Department notified the Union that it had received complaints from the Respondent about the picket signs driven into the right-of-way. Noting that a state ordinance prohibited installation of signs on a highway right-of-way without permission, the department requested that the Union refrain from staking the signs. On the following day, officers of the Independence police department visited the shopping center and advised the pickets that they could not stake the picket signs in the gravel right-of-way.

On June 12, 1991, the union representatives returned to the traffic islands and commenced picketing. Shortly

thereafter, the police arrived at Richards' request and arrested the pickets for trespass.²

The parking lot and the other common areas of the shopping center have been used, at all relevant times, without objection by various nontenant individuals and organizations to advertise items for sale, solicit donations, conduct fundraising activities, and to park for extended periods of time. The Respondent has permitted the Shriners, the Salvation Army, little league baseball teams, and the Boy Scouts, among others, to engage in fundraising activities in the parking lot and at its entrance. Cars have been displayed and advertised for sale in the parking lot. Various nontenant businesses, including a donut shop, an auto repair company, and an auto parts store, have placed leaflets on the windshields of cars parked in the lot. School organizations also distributed handbills advertising fundraising events. In September 1989, Tom Richards helped distribute handbills promoting an antique and gun show.

In *Davis Supermarkets*, 306 NLRB 97 (1992), the Board found a violation of Section 8(a)(1) where the respondent allowed other organizations to solicit customers on the sidewalk in front of its store but prohibited union activity. The Board noted in *Davis* that the *Lechmere* decision does not disturb the Court's statement in *NLRB v. Babcock & Wilcox*, 351 U.S. 105, 112 (1956), that "an employer may validly post his property . . . if [it] does not discriminate against the union by allowing other distribution."

In the instant case, the record clearly indicates that, both before and during the time the Union sought to picket on the traffic islands in front of its store, the Respondent allowed other organizations unlimited access to its parking lot for activity unrelated to its store. The Respondent routinely permitted charitable and civic organizations, such as the Shriners, the Salvation Army, and a local Boy Scout troop, to solicit contributions and sell items outside its store. School organizations have also leafleted cars and used the parking lot for fundraising purposes. Other nontenant businesses in the area are permitted to place advertising leaflets on cars in the parking lot. Automobiles with "for sale" signs posted in the windows are regularly parked in the parking lot near the highway and left unattended for days. At the same time, however, the Respondent has denied the Union the use of the traffic islands in the parking lot for protected activities.³ Under these cir-

cumstances, we find that the Respondent's conduct constituted unlawful disparate treatment of protected union activity, in violation of Section 8(a)(1) of the Act.⁴

CONCLUSION OF LAW

By discriminatorily demanding that representatives of the Union cease their peaceful picketing on traffic islands in the parking lot in front of its store and by causing the police to arrest the representatives, the Respondent has violated Section 8(a)(1) of the Act.

THE REMEDY

Having found that the Respondent, Susquehanna United Super Inc. d/b/a Richards United Super, violated Section 8(a)(1) of the Act, we shall order it to cease and desist and to take certain affirmative action that will effectuate the policies of the Act.

ORDER

The National Labor Relations Board orders that the Respondent, Susquehanna United Super Inc. d/b/a Richards United Super, Independence, Missouri, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discriminatorily prohibiting representatives of United Food and Commercial Workers Union, Local 576, affiliated with United Food and Commercial Workers International Union, AFL-CIO, CLC from picketing on traffic islands in the parking lot in front of its store by demanding that they leave the shopping center premises and by causing the police to arrest the representatives.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Post at its store in Independence, Missouri, copies of the attached notice marked "Appendix."⁵ Copies of the notice, on forms provided by the Regional Director for Region 17, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

²The Respondent also contacted the occupants of the surrounding property and induced them to prohibit the picketers from parking their vehicles in their parking lots.

³The record shows that although the Respondent's owners have authority to limit access to the premises of the mall, there is no set standard or policy for such a decision, and in fact the Respondent has granted access to outside individuals and organizations for sales, solicitations, and distributions but singled out the Union for proscription.

⁴We therefore find it unnecessary to engage in an accommodation analysis of the Sec. 7 and property rights.

⁵If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

(b) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

- To organize
- To form, join, or assist any union
- To bargain collectively through representatives of their own choice
- To act together for other mutual aid or protection
- To choose not to engage in any of these protected concerted activities.

WE WILL NOT discriminatorily prohibit representatives of the United Food and Commercial Workers Union, Local 576, affiliated with United Food and Commercial Workers International Union, AFL-CIO, CLC from picketing on the traffic islands in the parking lot in front of our store by demanding that they leave the shopping center premises and by causing the police to arrest them.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

SUSQUEHANNA UNITED SUPER INC.
D/B/A RICHARDS UNITED SUPER

Stanley D. Williams, for the General Counsel.
Stanley E. Craven (Spencer, Fane, Britt & Browne), of Kansas City, Missouri, for the Respondent.
Edward J. Houlehan (Houlehan & Waterman), of Kansas City, Missouri, for the Charging Party.

DECISION

STATEMENT OF THE CASE

JAMES S. JENSON, Administrative Law Judge. This case was heard in Mission, Kansas, on November 13, 1991,¹ pursuant to a complaint which issued on July 17. The complaint alleges that the Respondent violated Section 8(a)(1) of the Act by prohibiting peaceful picketing and causing the police to arrest representatives of the Union for engaging in peaceful picketing on traffic islands located in the parking lot in front of its facility. Relying on the Board's decision in *Jean Country*, 291 NLRB 11 (1988), the General Counsel argues

that the "Respondent's narrow property interest must give way to the Union's Section 7 activity." Acknowledging at the hearing that my decision would be guided by *Jean Country*, Respondent claimed that case was wrongly decided and that while it was permissible for the Union to picket on the islands as long as it was the certified representative of its employees, it lost that right when it was decertified on April 6, 1990.

All parties were given full opportunity to appear, to introduce evidence, to examine and cross-examine witnesses, to argue orally, and to file briefs. The General Counsel filed a brief which has been carefully considered.

On the entire record, including the demeanor of the witnesses, and having considered the posthearing brief, I make the following

FINDINGS OF FACT

I. JURISDICTION

It is admitted and found that Susquehanna United Super Inc. d/b/a Richards United Super is a corporation engaged in the operation of a retail grocery store in Independence, Missouri; that its annual gross revenues exceed \$500,000; that it annually purchases and receives products, goods, and materials in excess of \$50,000 directly from outside the State of Missouri; and that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

It is admitted and found that United Food and Commercial Workers Union, Local 576, affiliated with United Food and Commercial Workers International Union, AFL-CIO, CLC is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Facts*

This case involves nonorganizational picketing by a decertified union on parking lot islands in front of a retail grocery store located in a shopping center. It does not involve the protest of an employer's unfair labor practices, area standards picketing, or the self-organizational rights of employees outlined in Section 7 of the Act.⁴

Arrowhead Center is a strip shopping mall located on State Highway 24 1 mile east of State Highway 291 and a half mile west of Kentucky Road, in Independence, Jackson County, Missouri. Independence, with a population of 112,301, is in the northeastern section of the greater Kansas City metropolitan area which encompasses five counties located in Kansas and Missouri and which has a population of 1,566,280. Highway 24 running in front of the shopping mall is a major east-west artery consisting of two lanes for each direction and a center left-turn lane. The speed limit on Highway 24 is 45 miles per hour. Cars traveling along Highway 24 in an easterly direction enter Arrowhead Center by turning right directly from the lanes of traffic without benefit of a turn lane. Cars traveling west along Highway 24 use the center left-turn lane to make the left turn into Arrowhead Center. There are no traffic control signals to control traffic making a left turn into the mall parking lot from either of the two entrance driveways located on Highway 24. There is

¹ All dates are in 1991 unless stated otherwise.

also an entrance to the parking lot at the rear of the mall from Bundschu Road. Highway and Transportation Department records for 1990 show that during a certain 24-hour period, 26,583 vehicles were counted traveling east or west on Highway 24 at the junction of Highway 291, and 21,451 vehicles were counted traveling east or west on Highway 24 at the intersection of Kentucky Road. The junction of Highways 24 and 291 is located approximately 1 mile to the west of the shopping mall entrance closest to the Respondent's store, and the junction of Highway 24 and Kentucky Road is approximately a half mile to the east. Witnesses testified that the flow of traffic on Highway 24 is heavy and often exceeds the 45-mile-per-hour speed limit.

Arrowhead Center contains 24 store fronts, 12 of which were occupied on June 12. The Respondent's retail grocery store is the anchor tenant in the mall, having a leasehold interest. All the stores in the strip share a paved parking lot between the mall and Highway 24 with approximately 350 marked parking spaces. The principal access to the parking lot is via the two entrances from Highway 24. The record does not disclose any pedestrian traffic into the mall, it appearing that all customers drive in and park in the common parking lot.

Respondent's market stands directly facing Highway 24. There are three oblong islands located in the parking lot, parallel to the sidewalk in front of Respondent's facility and about 20 feet north of the sidewalk toward Highway 24.

The Respondent and the Union have had a collective-bargaining relationship for many years covering separate units of clerks and meat department employees, the most recent agreement having expired January 10, 1989. Around April 1989, although not on strike, the Union commenced a picket and handbilling campaign against Respondent in protest of the latter's bargaining proposals, with the purpose of encouraging the public not to shop in Respondent's store. For the first few days the Union picketed and handbilled customers at the front doors to the store; however, after several confrontations between the pickets and management, the Union moved its picketing activities to the two islands in the parking lot nearest the entrance to the store. By letter dated April 5, 1989, the then-owner of Arrowhead Center notified the Union that it objected to the picketing on its property and had granted Respondent's owners authority to have picketers removed from the property. Thereafter, the Union moved its picketing activity from the parking lot to the gravelled right of way next to Highway 24. By letter dated June 22, 1989, the property manager for the shopping center granted the Union the "right to picket and disperse information to the customers" of Respondent, "the picketers will confine themselves to the two concrete islands at the front of the store." Thereafter, the Union resumed its activity on the parking lot islands.

Pursuant to Board-conducted elections, the Union was decertified as the collective-bargaining representative of the employees in both units on April 6, 1990. Thereafter, the Union ceased its picketing activity on the parking lot islands and resumed picketing on the right-of-way between the shopping center and Highway 24, with signs reading:

**TO THE PUBLIC
PLEASE DO NOT SHOP
RICHARDS UNITED SUPER
THIS EMPLOYER DOES NOT
EMPLOY MEMBERS OF UFCW
LOCAL 576**

In addition to carrying signs bearing the above legend, the picketers also drove stakes bearing the sign language into the ground on the highway right-of-way. Sometime prior to July 26, 1990, the ownership and control of the shopping center changed, and on that date the new owner granted Respondent the following authority:

1. To ask and demand that any person or group of persons leave the common parking area, driveway, sidewalks and premises leased to Richard's United Super, if at Tom or Jane Richard's discretion, that the particular person or group of persons is present on the property for the purpose of protesting or picketing, for an unlawful activity, or for any other activity that interferes with a patron or business activity of Richard's United Super or any other tenant at Arrowhead Center.
2. To sign a complaint for trespass, disturbing the peace, or any other violation of an ordinance of the City of Independence, Missouri arising from any activity described in (1) above; and
3. To have any unwanted or abandoned motor vehicle towed from the parking lot or driveway at 18001 East 24 Highway.

That authority was in effect at the time of the instant hearing.

By letter dated June 10, 1991, the District Engineer for the Missouri Highway and Transportation Department informed the Union's attorney that the department had received complaints from the Respondent that picket signs had been driven into the ground on the highway right-of-way; that Missouri Revised Statute, § 227.220 prohibited the installation of signs on highway right-of-way without the written permission of the department; and requested the Union to refrain from doing so. On June 11, officers of the Independence police department advised the picketers that they couldn't stake the picket signs in the gravel right-of-way. There was also evidence that Respondent had contacted occupants of surrounding property and induced them to prohibit the picketers from parking their vehicles in their parking areas.

The morning of June 12, on the advice of legal counsel, the picketers commenced picketing on the traffic islands in the front of Respondent's store. Shortly thereafter the police arrived and, pursuant to the request of one of Respondent's owners, arrested the pickets for trespass because of their picketing activity on the parking lot islands.

The parties stipulated that on several occasions since April 1989 tenants of Arrowhead Center had complained to the center managing agent that the presence of the pickets at the parking lot and driveways was creating a problem for their businesses.

The record further shows that the parking lot and other common areas of the shopping center have been used, appar-

ently without objection, by various nontenant persons and entities to advertise products for sale, solicit donations, conduct fundraising activities, to park for extended periods of time, and advertise automobiles for sale.

In addition to arguing that picketing on the highway right of way is not safe for a variety of reasons, the General Counsel, relying on the Board's decision in *Jean Country* supra, and its progeny, also contends the Union is without an alternative means to advertise its dispute with Respondent. In this regard, it is claimed that "Handbilling potential customers of Respondent from the right-of-way as they enter the parking lot is not feasible. Efforts to do so, with the volume and speed of traffic on Highway 24, together with the absence of a right turn lane into the shopping center, would create considerable traffic congestion and add to the already dangerous conditions on the roadway. Likewise, mass advertising by the Union is not a feasible means to communicate its message to the public as the Union, as evidenced by its placement in receivership by the International, cannot afford such an alternative means and even when efforts to do so were explored, the local newspaper rejected the Union's advertisement because of Respondent's high volume advertising with the same paper." After analyzing the criteria set forth by the Board in *Jean Country*, the General Counsel concludes that "Respondent's private property interest here does not weigh heavily and is substantially less than a more private non-retail setting," and that the Union's publicity message is worthy of accommodation against substantial impairment. In such circumstances, it is argued, "the Union's Section 7 right is relatively strong vis-a-vis the Respondent's asserted property right." As noted at the outset, the Respondent claims that *Jean Country* was wrongly decided, and that while it was permissible for the Union to picket on the islands as long as it was the certified representative for its employees, it lost that right when it was decertified on April 6, 1990.

B. Discussion

The complaint alleges, in substance, that by prohibiting picketing on the traffic islands, and by causing the police to arrest union representatives for so picketing, the Respondent violated the Section 7 rights of Respondent's employees, thereby violating Section 8(a)(1) of the Act. As it is clear from the evidence that the Union neither represents nor sought to organize Respondent's employees, the General Counsel's argument is grounded on "the Union's Section 7

right." In this vein, the final sentence in the General Counsel's brief reads: "Hence, under *Jean Country* analysis, Respondent's narrow property interest must give way to the Union's Section 7 activity."

On January 27, 1992, the Supreme Court issued its decision in *Lechmere, Inc. v. NLRB*, 111 S.Ct. 1302 (1992),² rejecting the balancing test adopted by the Board in *Jean Country*, supra. The Court stated at section II,A:

Section 7 of the NLRA provides in relevant part that "[e]mployees shall have the right to self-organization, to form, join or assist labor organizations." 29 U.S.C. para. 157. Section 8(a)(1) of the Act, in turn, makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of rights guaranteed in [para. 7]." 29 U.S.C. para. 158(a)(1). By its plain terms, thus, the NLRB confers rights only on *employees*, not on unions or their non-employee organizers.³

The Court made it clear that any rights to trespass by non-employees derives from the employees' organization rights under Section 7. It was neither alleged nor shown in the instant case that the Union either sought to contact, or that the Respondent unlawfully restricted the Union's access to Respondent's employees. Having failed to establish the Union had a derivative right under Section 7, the language of the Supreme Court compels a finding that the Respondent did not violate the Section 7 rights of its employees when it prohibited union representatives from engaging in trespassory picketing on the islands in the front of its facility. Accordingly, I recommend dismissal of the complaint.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. Respondent has not engaged in the unfair labor practices alleged in the complaint.

[Recommended Order for dismissal omitted from publication.]

² 295 NLRB 92 (1989), enfd. 914 F.2d 313 (1990).

³ Emphasis by the Court.